STATEMENT REGARDING ORAL ARGUMENT

The United States does not consider oral argument necessary in this case. However, should the Court order oral argument, the United States does not waive its opportunity to be heard.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-2627

IN RE REILLY TAR & CHEMICAL CORPORATION,

Petitioner

MEMORANDUM OF THE UNITED STATES OF AMERICA IN RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

STATEMENT OF ISSUES

Whether, when a district court on undisputed facts grants summary judgment striking a defense of prior settlement, a writ of mandamus must issue from this Court to correct the supposed "error" in granting summary judgment before the time any appealable order is issued by the district court.

A. A writ of mandamus is an exceptional remedy to be used only where there is clear abuse of discretion or a usurpation of judicial power. The writ is not to be used as a substitute for appeal, even though the party seeking review may suffer hardship or undergo an unnecessary trial.

Bankers Life & Casualty Co. v. Holland, 364 U.S. 39 (1953)

Schlagenhauf v. Holder, 379 U.S. 104 (1964)

B. In order for a writ of mandamus to issue, the Petitioner's right to a writ must be clear and indisputable and the district court's decision must be blatantly wrong. Here the district court's decision that, as a matter of law, the State of

Minnesota had not settled its previous lawsuit against Reilly Tar & Chemical Corporation ("Reilly") was based on evidence from which the district court could reasonable conclude that no reasonable inferences could sustain Reilly's defense.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953)

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977)

Central Microfilm Service Corp. v. Basic/Four Corp. 688 F.2d 1206 (8th Cir. 1982), cert. denied, 103 S. Ct. 1191 (1983)

C. Reilly will not be damaged or prejudiced by a denial of its petition since a direct appeal following final judgment would correct any supposed "error" and would provide adequate relief, if Reilly is entitled to any relief from the district court's decision.

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977)

Evans Electrical Construction Co. v. McManus, 338 F.2d 952 (8th Cir. 1964) (per curiam).

D. A decision either way on Reilly's petition would not affect Reilly's liability under federal law to the United States for its contamination of the drinking water of Minnesota communities.

Comprehensive Environmental Response, Compensation and Liability Act of 1980, sections 104, 106(a) and 107, 42 U.S.C. §§ 9604, 9606(a), 9607

Resource Conservation and Recovery Act of 1976, section 7003, 42 U.S.C. § 6973

STATEMENT OF THE CASE

From 1917 to 1972, the Reilly Tar & Chemical Corporation ("Reilly") operated a tar refinery and wood treatment plant in St. Louis Park, Minnesota. In the course of its operations, Reilly contaminated a deep well located in the center of its refinery with coal tar, containing polynuclear aromatic hydrocarbons ("PAH's"); some of the PAH's are cancinogenic and others are tumor promoters. The deep well which Reilly contaminated is open to the Prairie du Chien aquifer which provides much of the drinking water to the communities of St. Louis Park and Hopkins. As a result, six drinking water wells in St. Louis Park and one well in Hopkins have been closed. In addition, Reilly failed to control pollution in its industrial waste streams leaving the property, and thus contaminated soil and groundwater in a swamp area south of its former property.

In 1980, the United States sued Reilly under § 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, seeking injunctive relief to remedy the hazards to public health which Reilly created. United States v. Reilly Tar & Chemical Corporation, Civil No. 4-80-469 (D. Minn.). Following the adoption of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the United States amended its complaint to add counts seeking injunctive relief under CERCLA § 106(a), 42 U.S.C. § 9606(a), and restitution of monies spent to clean up the contamination caused by Reilly under CERCLA § 107, 42 U.S.C. § 9607.

The State of Minnesota, the City of St. Louis Park and the City of Hopkins intervened as plaintiffs in this action, each raising claims under RCRA § 7003 and CERCLA § 107, as well as under State law. Reilly, in its answer to Minnesota's complaint, asserted as its second affirmative defense that the State was barred from asserting its claims against Reilly in federal court by virtue of an alleged settlement in a previous state court action brought by the State and the City of St. Louis Park against Reilly in 1970. State of Minnesota v. Reilly Tar & Chemical Corp., Minn. Fourth Jud. Dist., File No. 670767 (hereinafter "the State court action"). The State sought summary judgment on that defense, arguing that as a matter of law, no such settlement occurred in the state court action, and even if a settlement had occurred, it did not bar the State's current claims against Reilly. On August 25, 1983 the district court granted the State summary judgment on Reilly's second affirmative defense, holding that Reilly had not presented any evidence from which it could be inferred that the State had settled the 1970 State court action with Reilly. Reilly then moved for reconsideration, or in the alternative, for certification of the issue for interlocutory appeal to this Court under 28 U.S.C. § 1292(b). On October 31, 1983, the district court denied Reilly's motion for reconsideration and for certification. On November 30, 1983, Reilly petitioned this Court for a writ of mandamus asking this Court to order the district court to vacate its Orders of August 25, 1983 and of October 31, 1983.

As part of the district court's order of August 25, 1983, the district court also granted the United States judgment on the pleadings with respect to Reilly's first and second affirmative defenses to the United States' complaint. Reilly's first affirmative defense to the United States' complaint is identical to its second affirmative defense to the State's complaint. Compare A-5 with A-7. Reilly does not contest the district court's rulings on its defenses to the United States' complaint here. Indeed, Reilly has stated in its brief before this Court that "[t]he settlement defense is obviously not applicable to the claims of the United States in this action since the United States was not a party to the 1970 litigation." Pet. at 10-11 n. 7.

Currently, the United States and the State of Minnesota are spending monies to address the environmental problems at the former Reilly plant site under a cooperative agreement, authorized under CERCLA § 104, 42 U.S.C. § 9604. A-89, at p. 6. Under section 104(c)(3) of CERCLA, 42 U.S.C. § 9604(c)(3), 90 percent of the money being spent to investigate the environmental injury caused by Reilly at the site and to design and implement a remedy comes from the federal Superfund, created under CERCLA § 221, 42 U.S.C. § 9631, and 10 percent of the money (not including administrative expenses) comes from the State. Thus, if Reilly were successful in proving this settlement defense against the State, Reilly might be relieved of its liability under CERCLA § 107 for the 10 percent of the money being spent which comes from the State, but not of its liability for the remaining 90 percent spent by the United States.

ARGUMENT

PETITIONER'S CLAIM THAT THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON AN AFFIRMATIVE DEFENSE DOES NOT JUSTIFY A WRIT OF MANDAMUS WHERE THE DISTRICT COURT DECISION WAS NOT A USURPATION OF JUDICIAL POWER AND THE CLAIMED ERROR IS CORRECTABLE ON APPEAL

Reilly has asked this Court to invoke the extraordinary remedy of issuing a writ of mandamus under 28 U.S.C. § 1651 to the district court to vacate its decision to grant summary judgment in favor of the State of Minnesota on Reilly's Second Affirmative Defense to the State's Complaint in intervention ("settlement defense"). A writ of mandamus is an unusual remedy "to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power.'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953), quoting De Beers Consolidated Mines v. United States, 325 U.S. 212, 217 (1945); accord, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978). Here Reilly seeks to have this Court employ that unusual power to vacate a decision of summary judgment which the district court rendered in accordance with Rule 56 of the Federal Rules of Civil Procedure. Obviously, Reilly is disappointed in the district court's ruling on the State's summary judgment motion, but there is nothing about the district court's grant of summary judgment which justifies Reilly's seeking a writ of mandamus. The district court did not abuse its discretion or usurp judicial power. Instead, it simply applied the State law of contracts to a set of facts, determined that as a matter of law that the State had never settled its State court action against Reilly, and thus granted the State

summary judgment on Reilly's second affirmative defense. This is precisely what district courts are authorized to do under Rule 56.

Reilly may, of course, appeal the district court's decision on this defense once a judgment has been rendered on all issues in the district court action, but Reilly's displeasure with the district court's ruling does not justify Reilly's seeking a writ of mandamus from this Court before final judgment. As the Supreme Court has often stated, "the writ is not to be used as a substitute for appeal," Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953); Ex parte Fahey, 332 U.S. 258, 259-60 (1947); EEOC v. Carter Carburetor, Division of ACF Industries, Inc., 577 F.2d 43, 45 (8th Cir. 1978), even though the party seeking review may suffer hardship or undergo an unnecessary trial. Schlagenhauf v. Holder, supra, 379 U.S. at 110; Bankers Life & Casualty Co. v. Holland, supra, 364 U.S. at 382-83; United States Akali Export Ass'n v. United States, 325 U.S. 196, 202-03 (1945); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 31 (1943).

In order to disturb the judicial policy against piecemeal appeals, Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam); Will v. United States, 389 U.S. 90, 96 (1967); Central Microfilm Service Corp. v. Basic/Four Corp., 688 F.2d 1206, 1212 (8th Cir. 1982), cert. denied, 103 S. Ct. 1191 (1983), a petitioner must show that his right to a writ of mandamus is "'clear and indisputable,'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953), quoting United States

v. Duell, 172 U.S. 576, 582 (1899), and the decision of the District Court must be "blatantly wrong." Central Microfilm Service Corp. v. Basic/Four Corp., supra, 688 F.2d at 1212. Here, Reilly's right to a writ is by no means clear or indisputable, nor is the district court's decision blatantly wrong. Reilly is contesting the district court's ruling on a motion for summary judgment concerning one of its defenses to the State's complaint in intervention. The district court ruled that Reilly had presented no evidence from which it could be inferred that the State agreed to settle the State court action against Reilly. In deciding this issue, the district court relied on the following undisputed facts:

(1) The State had never filed a notice of dismissal with the Court in the State Court action. Affidavit of Dennis M. Coyne, attached to A-11.

(2) The Minnesota Pollution Control Board never authorized the attorneys representing the State to settle with Reilly, nor had any attorney representing the State entered into any settlement agreement with Reilly. Affidavits of Robert Lindall, John Van de North, Byron E. Starns and Ann B. Lee, attached to A-11.

(3) When the City of St. Louis Park settled its suit against Reilly in 1972, it entered into an agreement to hold Reilly harmless against certain unresolved claims raised by the State in the State Court action. A-17 at p. 9-10.

(4) Reilly offered no evidence that anyone acting on its behalf negotiated a settlement with the State.

In light of these undisputed facts, it is impossible to call the district court's decision to grant the State summary judgment an abuse of discretion or a unsurpation of judicial power. It is clear that the undisputed facts before the district court provided a reasonable basis for the district court's decision to grant summary judgment, and Reilly does not have a clear and indisputable right to a writ of mandamus.

Moreover, this Court in Evans Electrical Construction Co. v. McManus, 338 F.2d 952 (8th Cir. 1964) (per curiam) held that a defendant is not entitled to seek a writ of mandamus to overturn a district court decision striking an affirmative defense on the ground that it is insufficient as a matter of law. In Evans, this court held that the proper way to seek interlocutory review of a district court decision to strike an affirmative defense is to seek certification under 28 U.S.C. § 1292(b), as Reilly has been done. 338 F.2d at 953. But, if the district court declines to certify the issue, this Court stated that there is no "right under such circumstances to seek mandamus even where an attempt has been made and denied under § 1292(b)." 338 F.2d at 953. This Court further concluded that the striking of an affirmative defense, if it was an error, is a matter that is correctable on appeal and thus not sufficient grounds for a writ of mandamus.

> The situation here cannot be contended to be different from that of other cases generally in which defenses are stricken by a trial court, and where the question is simply whether error was committed which entitles a party to the reversal of the judgment on appeal therefrom. As we have indicated, the fact that it may be necessary to remand a cause for a new trial or other proceedings does not of itself amount to "extraordinary circumstances" on which to predicate an application for a writ of mandamus.

338 F.2d at 954. Reilly is in the same situation as was the defendant in Evans (except that Reilly has sought certification under section 1292(b) and was denied), and Reilly's petition should be treated the same way.

Indeed, Reilly is unable to satisfy any of the five criteria which the Ninth Circuit identified in Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977) (a case upon which Reilly heavily relies, Pet. at 37) as factors which the courts have considered in determining whether to issue a writ of mandamus. The factors identified by the Bauman court were: (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the desired relief; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an often repeated error, or manifests the court's persistant disregard for the federal rules; and (5) the petitioner raises new and important problems or issues of law of first impression. Bauman v. United States District Court, supra, 557 F.2d at 654-55, and cases cited

therein.

(1) A Direct Appeal Would Provide an Adequate Means for Reilly to Seek Relief.

Contrary to Reilly's assertions, there is no special need for this Court to undertake interlocutory review of the district court's decision to grant the State summary judgment on Reilly's settlement defense. Once a district court issues a final judgment in this action, Reilly would, of course, be free to appeal the district court's grant of summary judgment. If, on direct appeal, the district court's decision to grant summary judgment were overturned, then trial could go forward on that defense at that time. Moreover, Reilly could seek to take additional discovery to prepare for trial. Thus, a direct appeal would provide a wholely adequate means for Reilly to seek relief. See Evans Electrical Construction Co. v. McManus, supra, 388 F.2d at 954.

Reilly argues that this settlement defense is inextricably bound up with the other issues of this case, so that it could not be tried apart from the rest of the case. Pet. at 2-6, 57-58. This is clearly false. The settlement defense only applies to the claims of the intervening plaintiff State of Minnesota; it does not apply to the claims of the United States which form the core of this action. The United States here seeks injunctive relief under CERCLA § 106(a) and RCRA § 7003 to require Reilly to remedy the hazardous environmental conditions at the site of its plant. Even if the State's claims for injunctive relief are barred by the alleged settlement, the United States would not be

barred from seeking injunctive relief.*/ Moreover, under the CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3), cooperative agreements between the United States and the State of Minnesota to investigate the hazards at the site and design a remedial program are to provide that the United States is responsible for 90 percent of the funds being spent, and the State is responsible for 10 percent. Even if Reilly could prove its settlement defense against the State, Reilly could be still found liable to the United States under CERCLA § 107 for the substantial portion of the monies spent to investigate and clean up the site. Thus, Reilly's settlement defense is merely an ancillary issue in this action.

(2) Reilly Will Not Be Damaged or Prejudiced by the Denial of Writ.

Reilly will not be prejudiced by this Court's denial of the writ. The only prejudice about which Reilly complains is that it cannot complete discovery on the very settlement defense on which the district court has granted summary judgment. Pet. at 59. If cutting off discovery on an issue resolved by a summary judgment motion is an impermissable form of prejudice, then summary judgment would never be granted on any issue.

In any event, the supposed prejudice which Reilly claims it would suffer is easily correctable on a direct appeal following

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*/ Only the United States may seek injunctive relief under CERCLA § 106(a). Moreover, the injunctive remedy in RCRA § 7003 also belongs principally to the United States; the State of Minnesota may only invoke section 7003 indirectly by suing under the citizen suit provision of RCRA, section 7002, 42 U.S.C. § 6972.

final judgment. If, upon direct appeal, this Court were to reverse the district court's grant of summary judgment and order trial on the settlement defense, Reilly could be permitted to take further discovery before that trial. Thus, a writ of mandamus is not necessary to protect Reilly from otherwise uncorrectable prejudice.

(3) The District Court's Order Is Not Clearly Erroneous as a Matter of Law, But is Correct.

This Court has stated that a district court's aciton must be "blatantly wrong" in order to justify the issuance of a writ of mandamus. Central Microfilm Service Corp. v. Basic/Four Corp., supra, 688 F.2d at 1212. Both the United States and the State of Minnesota believe that the district court's ruling was not simply reasonable, but correct. The State in its brief discusses at length the reasons why that decision is correct; these reasons will not be repeated here. Instead, the United States will simply point out that whether or not the district court's decision is correct, it clearly has a reasonable basis in the undisputed evidence before it, and thus is not "blatantly wrong".

Here the district court found "the record void of facts from which it could be reasonably inferred that a definite offer and acceptance between Reilly and the State occurred which could constitute a meeting of the minds on the essential terms of a settlement agreement." A-2 at p. 16. Considering the undisputed facts that the Minnesota Pollution Control Board never authorized a settlement, that the State never signed a settlement agreement

or filed a stipulation of dismissal in the State court, and Reilly cannot identify someone who negotiated a settlement with the State on Reilly's behalf, the district court's decision is reasonable. Indeed, Reilly's principal witness on this issue, Thomas E. Reiersgord, in his Affidavit to the district court, stated that on or about June 15, 1973, when he was concluding negotiations with the City, he was informed that the State was not prepared to settle the State Court action. A-17 at p. 9. Thus, Reilly's principal witness testified that the last thing he heard about the State's intentions was that the State was not prepared to settle. Accordingly, it was not blatantly wrong for the district court to conclude that the State's acceptance of a settlement cannot be inferred.

(4) Even Reilly Does Not Claim that the District Court's Decision is an Oft-repeated Error

Reilly does not claim that the district court's summary judgment decision is an oft-repeated error. Accordingly, this criterion should not be considered in this Court's decision on Reilly's petition.

(5) The District Court's Decision Does Not Raise New or Important Issues or Questions of Law of First Impression.

The district court's decision does not raise important or new issues of law. The district court's decision simply applies traditional principles of contract law concerning offer and acceptance to a particular set of undisputed facts. There is nothing new in the district court's conclusion that where a party has not accepted any offer, there is no contract.

CONCLUSION

For the foregoing reasons, Reilly Tar & Chemical Corporation's petition for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 6th day of January 1984, I caused to be served by first class mail, postage prepaid, copies of the foregoing Memorandum of the United States of America in Response to Petition for a Writ of Mandamus upon the following:

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